

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. CR S-04-0194 FCD KJM P

vs.

AURELIANO CASTILLO-SANCHEZ,

Movant.

FINDINGS AND RECOMMENDATIONS

Movant, a federal prisoner proceeding pro se, has filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255.

I. Background

On May 20, 2004, an indictment was filed, charging movant with being a deported alien found in the United States in violation of 8 U.S.C. § 1326 (a). Docket No. 5.

On April 4, 2005, movant entered a plea of guilty memorialized in a written agreement, waived a presentence report and was sentenced to a term of thirty-seven months in prison. Docket Nos. 24, 25 (minutes, Plea Agreement, respectively).

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1 In the plea agreement, movant

2 admits that he was previously convicted of a felony drug
3 trafficking offense for which the sentence imposed exceeded
4 thirteen months within the meaning of U.S.S.G. § 2L1.2(b)(1)(A)
and that a sixteen-level enhancement to the offense level is
appropriate based upon this prior conviction.

5 Docket No. 25 (Plea Agreement ¶ 3). The agreement contained further stipulations regarding the
6 sentence:

7 The parties agree and stipulate that the following Sentencing
8 Guideline calculations are applicable to the single-count indictment
referenced in paragraph 1. Guideline § 2L1.2 applies.

9 The base offense level is 8 and 16 points are added pursuant to
10 U.S.S.G. § 2L1.2 (b) (1) (A) for the felony conviction referenced in
paragraph 3. The total adjusted offense level is 24.

11 A total of three (3) points are subtracted to give defendant credit
12 for acceptance of responsibility as noted in paragraph 8. An
additional four-level downward departure is subtracted based upon
the authorized early disposition program noted in paragraph 8.

13 Thus, the total offense level becomes 17. Defendant's Criminal
14 History Category is IV. The sentencing range is 37-46 months.

15 . . .The parties agree and stipulate to a sentence of thirty-seven (37)
months.

16 Id. ¶¶ 9, 11.¹ Finally,

17 The defendant understands that the law gives him a right to appeal
18 his conviction and sentence. He agrees as part of his plea,
19 however, to freely, knowingly and voluntarily give up the right to
20 appeal any aspect of his conviction or sentence. The defendant
21 also gives up any right he may have to bring a post-conviction
attack on any aspect of his conviction or sentence. He specifically
agrees not to file a motion under 28 U.S.C. § 2255 or § 2241
attacking any aspect of his conviction or sentence.

22 Id. ¶ 5.

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26 ¹ The plea agreement does not contain a paragraph 10.

1 II. The Instant Motion

2 Movant raises four grounds in his motion: the guideline calculation under
3 U.S.S.G. § 2L1.2 is invalid because he “did not admit nor did a jury find . . . that the prior
4 conviction was of the specified type and occurred [sic] in the required time frame in relation to my
5 deportation;” the sentence is greater than that specified in the applicable guideline range;
6 “petitioner [sic] seeks any relief” available to him under United States v. Booker, 543 U.S. 220
7 (2005); and counsel was ineffective in failing to file a motion for “time reduction” based on
8 Booker and Blakely v. Washington, 542 U.S. 296 (2004).

9 A criminal defendant may waive the right to appeal or file a collateral attack on a
10 conviction and sentence, so long as the waiver itself is knowing and voluntary. United States v.
11 Pruitt, 32 F.3d 431, 433 (9th Cir. 1994); United States v. Anglin, 215 F.3d 1064, 1066 (9th Cir.
12 2000); United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993). A claim of ineffective
13 assistance of counsel during the plea bargaining process almost certainly is cognizable despite a
14 waiver, while a claim of ineffective assistance of counsel during other aspects of the proceedings
15 may survive as well. Pruitt, 32 F.3d at 433; United States v. Jeronimo, 398 F.3d 1149, 1156 n.4
16 (9th Cir.), cert. denied, ___ U.S. ___, 126 S.Ct. 198 (2005); but see Williams v. United States,
17 396 F.3d 1340, 1342 (11th Cir.) (valid sentence appeal waiver precludes defendant from bringing
18 § 2255 motion alleging ineffective assistance of counsel at sentencing), cert. denied,
19 ___ U.S. ___, 126 S.Ct. 246 (2005). Because movant does not challenge the knowing and
20 voluntary nature of the waiver of appeal and collateral attack, his first three claims for relief are
21 not cognizable in this motion.

22 Although movant’s ineffective assistance of counsel claim survives his waivers, it
23 lacks merit.

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1 The federal law on claims of attorney ineffectiveness is clear:

2 First, the defendant must show that counsel's performance was
3 deficient. This requires a showing that counsel made errors so
4 serious that counsel was not functioning as the 'counsel'
5 guaranteed the defendant by the Sixth Amendment. Second, the
6 defendant must show that the deficient performance prejudiced the
7 defense.

8 Strickland v. Washington, 466 U.S. 668, 687 (1984). "[T]he performance inquiry must be
9 whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. A
10 court must "indulge a strong presumption" that counsel's conduct falls within the range of
11 competence. Strickland, 466 U.S. at 689, 690.

12 It is also movant's burden to establish prejudice: "A defendant must show that
13 there is a reasonable probability that, but for counsel's unprofessional errors, the result of the
14 proceeding would have been different. A reasonable probability is a probability sufficient to
15 undermine confidence in the outcome." Id. at 694. This evaluation must be based on the totality
16 of the evidence before the jury, recognizing the probability of a different outcome is less likely in
17 a case "with overwhelming record support." Id. at 695, 696. A court may consider prejudice
18 before determining whether counsel failed to act effectively. Id. at 697.

19 Booker was decided on January 12, 2005, well before movant was sentenced. In
20 Booker, the Supreme Court overturned the mandatory nature of the Sentencing Guidelines:

21 The district courts, while not bound to apply the Guidelines, must
22 consult those Guidelines and take them into account when
23 sentencing. . . . The courts of appeals review sentencing decisions
24 for unreasonableness. These features of the remaining system,
25 while not the system Congress enacted, nonetheless continue to
26 move sentencing in Congress' preferred direction, helping to avoid
excessive sentencing disparities while maintaining flexibility
sufficient to individualize sentences where necessary.

27 Booker, 543 U.S. at 264-65. The district court is presumed to know and follow the applicable
28 sentencing law and movant points to nothing to suggest the court was unaware of its discretion
29 under Booker. See United States v. Garcia-Garcia, 927 F.2d 489, 491 (9th Cir. 1991). Movant

1 has not explained how the court could be faulted for imposing the sentence that movant had
2 agreed was reasonable. Moreover, movant admitted that he fell within U.S.S.G.
3 § 2L1.2(b)(1)(A); under Blakely, this admission was an appropriate basis for movant's sentence.
4 Blakely, 542 U.S. at 310 ("When a defendant pleads guilty, the State is free to seek judicial
5 sentence enhancements so long as the defendant either stipulates to the relevant facts or consents
6 to judicial factfinding.").

7 Accordingly, IT IS HEREBY RECOMMENDED that:

8 1. Movant's June 20, 2005 motion to vacate, set aside, or correct his sentence
9 based on 28 U.S.C. § 2255 be dismissed; and

10 2. The clerk of the court be directed to close the companion civil case CIV-S-05-
11 1218 FCD KJM.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to this case based on the provisions of 28 U.S.C. § 636(b)(1). Within twenty days
14 after being served with these findings and recommendations, movant may file written objections
15 with the court. The document should be captioned "Objections to Magistrate Judge's Findings
16 and Recommendations." Movant is advised that failure to file objections within the specified
17 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
18 (9th Cir. 1991).

19 DATED: June 6, 2006.

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22 UNITED STATES MAGISTRATE JUDGE
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